Supreme Court, U.S.
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No. 91-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

THERESE A. BURKE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether discrimination on the basis of sex is a tort-like personal injury, such that amounts received in settlement of a claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, and designated in the settlement agreement as "litigation benefits" and not as back wages, are "damages received . . . on account of personal injuries" and therefore excludable from gross income under Section 104(a)(2) of the Internal Revenue Code.

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to the pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Respondents Therese A. Burke, Cynthia R. Center, and Linda G. Gibbs, are employees of the Tennessee Valley Authority and members of the Office and Professional Employees International Union, AFL-CIO (OPEIU). As such, they were among the beneficiaries of a lump sum payment from TVA in settlement of a Title VII sex discrimination case pursued by Judy Hutcheson and the OPEIU. This underlying case alleged that TVA had discriminated against female employees when, in 1981, it altered the means used to determine salaries for jobs in a salary schedule

dominated by women (Schedule SB), with the intent that the change would result in raising the salaries of other male-dominated salary schedules while reducing or holding stagnant the salaries of the female dominated SB jobs.

The Petition seeks review of a decision determining the income tax consequences of the amounts individuals received as litigation benefits in settlement of the sex discrimination claim. The Court of Appeals found that "injuries sustained in violation of Title VII are 'personal injuries,' and that damages resulting from such injuries are excludable from taxation under § 104(a)(2)" of the Internal Revenue Code. *Burke v. United States*, 929 F.2d 1119, 1119-20 (6th Cir. 1991) (Pet. App. 2a).[1] Relying on prior decisions of this Court, as well as numerous lower courts, the Sixth Circuit concluded that "injuries resulting from invidious discrimination . . . are injuries to the individual rights and dignity of the person." *Id.* at 1121 (Pet. App. 6a). Thus, damages received in settlement of claims for such injuries are "damages received . . . on account of personal injuries" and thus excludable from income under Section 104(a)(2). Relevant to the United States' claim that the damages should be taxed because they were for back wages, the Court of Appeals noted the significant facts of the underlying Title VII case, namely that the settlement agreement did not so designate the lump sum payment, and that TVA had not withheld taxes from the individual lump sum compensation paid to Judy Hutcheson, the only named individual plaintiff. The Sixth Circuit also rejected the United States' attempt to turn this into a case about back pay by holding that under the language of Section 104(a)(2), its interpreting regulations, Tax Court rulings, and numerous decisions of the Courts of Appeals, the relevant inquiry for determining excludability was

[1] References to Pet. App. are to the Appendix attached to the Petition for A Writ of Certiorari submitted by the United States.

the personal nature of the injury, and not the consequences (pecuniary loss or nonpecuniary loss) that flowed from the legal violation. *Id.* at 1121 (Pet. App. 6a).

With this Petition, the United States again seeks to inject into this case the argument, factually erroneous and legally irrelevant, that the lump sum settlement proceeds in the Title VII case were no more than deferred compensation, or back wages. Thus, the Petition mischaracterizes the factual posture and question decided below, and thus the Question presented to this Court. Accordingly, we have re-stated the Question Presented at the outset of this brief.

By misconstruing the damages in this case as tantamount to a contract claim for wages owed for work performed, the Petition attempts to manufacture a conflict in the Circuits that does not, in fact, exist, as is evident when the facts and actual holdings of the supposedly conflicting decisions are properly understood. Thus, there is no reason to grant the Writ. Moreover, the Writ should not issue because the decision below was clearly correct in following prior decisions of this Court characterizing the injury of invidious discrimination as personal in nature.

COUNTER-STATEMENT OF THE CASE

While the Statement of the Case offered by Petitioner United States is accurate insofar as it goes, it does not provide sufficient detail about the terms of the settlement of the underlying Title VII action for this Court to appreciate the particular reasons this case does not involve the issue of payment for deferred wages.

The underlying settlement came about after the district court denied cross-motions for summary judgment and ruled that plaintiffs Hutcheson and OPEIU had made out a prima facie case that TVA had committed

illegal sex discrimination. The settlement agreement provided for a lump sum payment of $4200 to individual plaintiff Judy Hutcheson. Although TVA was Hutcheson's employer, it did not withhold income taxes or FICA from her damages.

The remainder of the settlement was also in a lump sum amount, of $5,000,000, to be distributed to eligible individuals according to a formula to be determined by the OPEIU. This lump sum payment was designated as "litigation benefits" paid "for the purpose of resolving litigation" according to the specific terms of paragraph 5 of the settlement agreement. The Union determined that both length of service and rate of pay should be taken into account to determine the amount to be distributed to each individual. In most personal injury cases, including discrimination actions, rate of pay is a readily available reference point for measuring damages. The amount designated for each individual under the distribution formula did not simply equal any differential between the discriminatory rates of pay and a nondiscriminatory rate of pay. Indeed, the damages could not possibly have reflected a simple pay differential, because the calculation of what a nondiscriminatory wage structure might have been for female dominated job categories for the past years in question would have been a formidable, near impossible task.

Because the OPEIU did not have the administrative capability to distribute the lump sum settlement to the large number of entitled individuals, the Union asked TVA to perform the distribution according to the amounts determined by the OPEIU formula. TVA, concerned that as the employer of those to whom it would be distributing money it might be assessed liability if it did not withhold taxes, pursuant to IRC §§ 3101, 3102 (a), and 3402(a), insisted that it would perform the distribution only if it could withhold taxes. Fearful that the entire settlement would fall apart, the Union had

little choice but to accede to this demand. Consequently, the initial settlement agreement was amended to state that TVA would perform the distribution and that it would make the payments "less any taxes which TVA may be required to pay because it is the employer of any person whom OPEIU may designate to receive a portion of said sum." The Union's acquiescence to tax withholding in no way converted the lump sum settlement amount designated as "litigation benefits" into deferred wages.

The settlement agreement also provided that any amount which TVA was unable to distribute would be paid to the Union, "with a listing of the individuals involved and the amounts payable to each." As with the damages paid to Hutcheson, TVA did not make any tax withholdings from the portion of the $5,000,000 that it paid to the OPEIU (a total of $114,380.51, or 2.3% of the whole). OPEIU later did make distribution to some six individuals who came forward, tendering them the full amount to which they were entitled, without any reduction for taxes.

While recoveries in some employment discrimination cases, such as Equal Pay Act claims, might conceivably be only for the purpose of replacing a readily determinable exact amount of wages wrongfully deprived, the factual history recounted above demonstrates that the damages paid in this case cannot be so construed. The damages paid fulfilled the same purpose for all recipients, all of whom had experienced the same personal injury. They were, as stipulated by the settlement agreement, litigation benefits paid to resolve litigation for having suffered the indignity of discrimination, and for having brought TVA to account for its wrongful sex-based discrimination.

REASONS FOR DENYING THE WRIT

Petitioner United States misconstrues the nature of the injury and the settlement payments in the underlying Title VII case, and thus misstates the Question presented as involving the taxability of back wages. The Question as stated in the Petition, which departs from the particular facts of the case, leads to the appearance of a conflict among the Circuits. But, when the unique factual posture of this case, and the consequent nature of the settlement proceeds, are properly assessed and compared to the issues decided by the allegedly conflicting decisions, it is apparent that there is not the sort of conflict that might warrant review by this Court. Indeed, the circuit courts are remarkably uniform in concluding that invidious discrimination is a tort-like personal injury, no matter which of several available statutes are invoked to remedy it.

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

The case the Petitioner principally advances as posing a conflict is the Fourth Circuit's decision in *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989). The assertion that *Thompson* is in conflict with the decision below is curious, since the Fourth Circuit ruled consistently with the Sixth Circuit on all relevant legal issues. Both decisions are in agreement that under Section 104(a)(2) of the Code and the implementing Treasury regulations, 26 C.F.R. § 1.104-1(c), the relevant inquiry for determining excludability is whether an award is received for personal injuries through prosecution of a legal action based upon tort or tort-type rights. *Compare* 866 F.2d at 711 *with* 929 F.2d at 1121 (Pet. App. at 5a-6a). The Fourth Circuit also decided, consistent with the Sixth Circuit, that because "the right to be free from unreasonable gender discrimination is a personal right" (citing *Davis v. Passman*, 442 U.S. 228, 235 n.10, 99 S.Ct. 2264, 2271 n.10, 60 L.Ed.2d 846 (1979)), "sex discrimination

actions in general are tort or tort-type actions and damages awarded for violation of that right are damages for personal injuries." 866 F.2d at 712. The Sixth Circuit cited this ruling in reaching the identical conclusion. 929 F.2d at 1121 (Pet. App. 6a). The identical conclusions of the Fourth and Sixth Circuits regarding the personal, tort-like nature of the injury in Title VII sex discrimination cases determines the excludability issue under Section 104(a)(2).

A fair reading of *Thompson* reveals that it was essentially a treatment of tax consequences of an Equal Pay Act judgment without any probing consideration of the consequences of a Title VII violation. It was only coincidental on the facts of that case that the contract wage disparity also happened to be a violation of Title VII.

The Fourth Circuit concluded that back-pay awards under the Equal Pay Act are "more in the nature of a payment for a contract violation than for a tort-type right," and thus were not excludable under Section 104(a)(2). The court relied for its conclusion on the text of the Equal Pay Act itself, which characterized the back pay recoverable under that statute as "unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. § 206(d)(3). Thus, the Court said, back pay awards under the Equal Pay Act should be distinguished "from awards for lost wages or lost income in traditional personal injury/tort actions" (such as general sex discrimination claims). 866 F.2d at 712. See also *Kurowski v. C.I.R.*, 917 F.2d 1033, 1037 (7th Cir. 1990); *Sparrow v. Commissioner*, 57 T.C.M. (CCH) 816, 820 (1989), appeal pending, No. 90-1151 (D.C. Cir.) (interpreting *Thompson* holding on taxability of damages as based on Equal Pay Act, rather than Title VII).

Because the Fourth Circuit dealt exclusively with the tax consequences of an Equal Pay Act violation, it is evident that its ruling in *Thompson* poses no conflict with the Sixth Circuit's ruling on the nature of claims under Title VII, or their tax consequences.

The reasoning of *Thompson*, tied as it was to the Equal Pay Act, cannot be applied to Title VII. Unlike the Equal Pay Act, Title VII contains no statutory language characterizing recoveries for violations as "unpaid minimum wages or unpaid overtime compensation." The statutory characterization of the Equal Pay Act is understandable, given the nature of claims under the Act. The Act applies only to sex-based wage differentials for what is essentially the *same job*. Thus, there is a readily available contractual measure for recovery, namely, the higher wage rate paid to the men doing the same work. A recovery under the Act can be considered deferred wages for work actually performed because the recipient in fact performed the same work as male employees but did not receive the same rate of pay for the job.

In contrast, in a Title VII wage discrimination case, such as the underlying case in the present matter, the damages cannot be so characterized as contractual wages for work actually performed. The claim here is not, as in the *Thompson* Equal Pay Act claim, that the women workers did the identical work as males, and should therefore get the wage rate for the job performed by both. Rather, in the present situation, the jobs in the female-dominated SB salary schedule were not the same as the jobs in male-dominated schedules. The SB workers all received the full contractual measure of wages for their jobs. In other words, they were paid all they were contractually entitled for the work performed. But, as they successfully contended in the underlying Title VII suit, the manner and method of adoption of the contract rate for their jobs was impermissibly influenced by sex-based discrimination. Hence, they were victimized by the invidious discrimination, and required compensation "to make them whole from a previous loss of personal rights." *C.I.R. v. Miller*, 914 F.2d 586, 590 (4th Cir. 1990).

Moreover, given the particulars of the settlement agreement involved in the present case, the *Thompson* Equal

Pay rationale that the wages were contractually owed is obviously inapposite. There was no attempt, either in determining the lump sum settlement amounts or in fashioning the individual amounts to be distributed, to calculate a wage differential between similarly situated male and female employees. *Cf. Thompson*, 866 F.2d at 712. There was no effort made to peg the amount of individual distributions to any assessment of wages lost due to the discrimination. And, neither party to the settlement characterized the amounts as wages or in lieu of wages. Rather, the payments were designated by TVA as "for the purpose of resolving litigation" and by OPEIU as "litigation benefits." (Settlement Agreement para. 5; Amendment to Settlement Agreement para. 1, p.3).

The inapplicability of the *Thompson* Equal Pay Act ruling to the present Title VII situation is further underscored by the fact that the Equal Pay Act, unlike Title VII, is not classified as a civil rights statute. The Pay Act is contained in Title 29 of the U.S. Code, the Title pertaining to labor and commerce regulation, and was not enacted as part of a comprehensive Civil Rights Act. This placement suggests that it was intended to protect economic rights, rather than personal dignitary rights to be free from invidious discrimination. Title VII, on the other hand, was enacted as part of the Civil Rights Act of 1964, and is codified among the panoply of other civil rights protections in Title 42 of the U.S. Code. This placement underscores the conclusion that the rights protected by Title VII are personal, and the injuries suffered when such rights are violated are, in fact, personal injuries. *Cf. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1986) (fact that 42 U.S.C. § 1981 appears in the Chapter titled Civil Rights supports the determination that injuries made actionable by this statute are personal injuries, even though the statute pertains to the making of contracts; right to be free from discrimination in making of contracts is a personal right).

For these reasons, the portion of *Thompson* that interprets the Equal Pay Act is neither applicable to, nor in conflict with, the Sixth Circuit determination that the nature of harm redressed by Title VII is personal injuries from invidious discrimination.

Petitioner United States also suggests, without analysis, that the decision of the U.S. Court of Appeals for the Fifth Circuit in *Johnston v. Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 718 (1990), conflicts with the decision of the Sixth Circuit. Given the legally significant factual differences regarding the determination of damages in *Johnston* compared with the present case, *Johnston* is readily distinguishable.

Johnston concerned the method by which a trial court should determine the amount of back wages owed in an employment discrimination case brought under 42 U.S.C. § 1983 and Title VII. Such a ruling has little relevance to the present case, in which there never was any determination of an amount of back wages owed, either by the trial judge or the settling parties. The present case concerns only the characterization of a lump sum settlement amount in a case brought to redess the personal injury of invidious discrimination, when such settlement amount was designated by the parties not as attributable to wages but as "litigation benefits" paid "for the purpose of resolving litigation." The *Johnston* decision neither analyzed nor ruled on the determinative legal issue in the Sixth Circuit's opinion below: whether the nature of the injury of discrimination made actionable by Title VII is personal and tort-like in nature. For these reasons, the decision of the Fifth Circuit Court of Appeals does not present a square conflict with the Sixth Circuit.[2]

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[2] In a footnote in the Petition for a Writ of Certiorari, the United States also suggests that the decision in *Sears v. A.T. & S.F. Ry.*, 749 F.2d 1451 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985), stands contrary to the decision below. Similar to *Johnston*, the *Sears* decision concerned whether the trial court had abused its discretion in including a tax component in calculating the back pay award in a Title VII case. The analysis of the Court of Appeals turned on the Tax Code provisions for income averaging, a feature that is no longer part of the Code. In addition, the Tenth Circuit noted that "a tax component may not be appropriate in a typical Title VII case." 749 F.2d at 1456. And again, as in *Johnston*, the court did not discuss the central issue in the Sixth Circuit decision below—the characterization of discrimination as a personal injury. When, more recently than *Sears*, the Tenth Circuit did analyze this issue, it concluded that the victim of wrongful employment practices who sued under 42 U.S.C. § 1983 had suffered a personal injury for which he brought a tort-type claim. Thus, the award of back pay, which compensated him "for the economic injury resulting from the denial of his constitutional rights" was "an award of damages 'on account of personal injuries' and therefore not taxable" under I.R.C. § 104(a)(2). *Wulf v. City of Wichita*, 883 F.2d 842, 873 (10th Cir. 1989). *Wulf* was among the Court of Appeals decisions that provided guidance to the Sixth Circuit in determining how to characterize the injuries of age, sex, or race discrimination in employment. Thus, the Tenth and Sixth Circuits are in harmony.

In fact, the Courts of Appeals that have addressed, for purposes of applying Section 104(a)(2), whether employment-related discrimination is a personal injury redressed by a tort-like claim, stand in unanimity that it is an invasion of a personal right. In addition to *Thompson* and the decision below, *see Pistillo v. C.I.R.*, 912 F.2d 155 (6th Cir. 1990); *Rickel v. Commissioner*, 900 F.2d 655 (3rd Cir. 1990); *Best v. Commissioner*, 835 F.2d 67 (3rd Cir. 1987); *Kurowski v. C.I.R.*, 917 F.2d 1033 (7th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989). *See also Metzger v. Commissioner*, 88 T.C. 834 (1987), aff'd without opinion, 845 F.2d 1013 (3rd Cir. 1988).

Because there is no conflict between the circuits on the issue actually involved in this case, there is no basis for granting the writ.

II. THE DECISION OF THE SIXTH CIRCUIT IS COMPELLED BY CONTROLLING PRECEDENTS OF THIS COURT, AND THEREFORE PRESENTS NO ISSUE WARRANTING REVIEW

The central issue in this case is not the meaning and scope of § 104(a)(2), but, as the Sixth Circuit recognized, the meaning and characterization of the harm resulting from invidious discrimination in the employment context.

The meaning of the terms used in § 104(a)(2) of the Internal Revenue Code, and its implementing regulations, 26 C.F.R. § 1.104-1(c) (1990), are clear. The statute excludes from taxable income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." The Treasury regulations define a claim for personal injuries under § 104(a)(2) as one based upon "tort or tort-type rights."

By their terms, these provisions make no distinctions between physical personal injuries and nonphysical personal injuries. Nor do they make any distinctions between the economic and noneconomic consequences that flow from personal injuries. or the portion of damages attributable to pecuniary loss or to other forms of loss. *See, e.g., Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983); *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988). Consequently, as numerous courts including the Sixth Circuit below have held, the proper basis for determining whether the §104(a)(2) exclusion applies "requires an examination of the nature of the injury to determine whether the injury and claim are personal and tort-like in nature, and not whether the consequences of the injury resulted in an award of compensatory damages or damages for back pay." *Burke*, 929 F.2d at 1121 (Pet. app. 6a); *Threlkeld, supra*, 87 T.C. at 1299, 848 F.2d at 84; *Pistillo v. Commissioner*, 912 F.2d 145, 148-49 (6th Cir. 1990); *Rickel v. C.I.R.*, 900 F.2d 655 (3rd Cir. 1990); *Byrne v. Commissioner*, 883 F.2d 211 (3rd Cir. 1989); *Metzger v. Commissioner*, 88 T.C. 834 (1987), aff'd without pub. op'n, 845 F.2d 1013 (3rd Cir. 1988); *Bent v. Commissioner*, 853 F.2d 67 (3rd Cir. 1987); *Wulf v. City of Wichita*, 883 F.2d 842, 872-73 (10th Cir. 1989); *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983).

According to this widely agreed-upon test which is compelled by the language of the statute and regulations, the only issues to be determined in the present case are whether amounts recovered in a Title VII case serve as compensation for personal injury; and whether suffering discrimination in employment based on race, sex, religion, or national origin is an injury to personal rights, such that a claim that one's right to be free from such invidious discrimination has been violated is a claim based on "tort-type rights."

In the Petition, the United States never addresses these issues, nor does it offer any basis for concluding that the Sixth Circuit and all the other Courts of Appeals and the Tax Court have erroneously characterized employment discrimination actions as tort-like claims for personal injuries.

The dictionary definition of Tort makes it clear that a claim under Title VII is one based on "tort-type rights." Black's Law Dictionary (5th ed. 1979), defines a Tort as "a private or civil wrong or injury, other than breach of contract. . . . A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. . . . A legal wrong committed upon the person . . . independent of contract."

Invidious employment discrimination is a "civil wrong," and a violation of "a duty imposed" by Title VII. This duty has been imposed because society has made the moral and economic determination that in keeping with the commitment to equality of opportunity, as a

matter of law it will not abide such discrimination. Such duty exists wholly independent of contract. Thus, when one suffers employment discrimination in violation of Title VII it is a "personal injury" because one endures an "invasion of rights granted by virtue of being a person in the sight of the law." *Threlkeld v. Commissioner*, *supra*, 87 T.C. at 1308. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454, 457-58 (1975) (purpose of Title VII to create statutory rights against the wrong of invidious employment discrimination); *Rickel v. C.I.R.*, 900 F.2d at 662 (ADEA antidiscrimination provision is tort-like for these reasons); *Byrne v. Commissioner*, 883 F.2d at 215 (FLSA antidiscrimination provision creates tort-type rights under this analysis).

In the Petition, the United States acknowledges that this Court stated, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), that Title VII remedies are designed "to make persons whole for injuries suffered on account of unlawful employment discrimination." This statement is a classic formulation of the purpose of tort and tort-like remedies. Yet the United States seeks to evade the "personal injury/tort-type rights" issue by asserting that the recovery in a Title VII case is tied to income.[3] Yet this argument proves far too much, for a significant aspect of the recovery in most personal injury cases concerns lost income—both sums lost prior to judgment or sums prospectively lost. Tort law and tort-type

[3] The petitioner's argument that the damages in this case should be taxable turns on the argument that they were really no more than deferred wages. Ignoring the terms of the settlement agreement, petitioner turns for support to the fact that the complaint sought back pay, as any Title VII complaint must do, and that the case involved discrimination in setting wages. Because these arguments deal only with the *consequences* of the injury of discrimination, rather than the personal or non-personal *nature* of the injury, they are irrelevant. After all, wage loss figures prominently among the consequences of virtually all personal injuries, yet this hardly converts them into nonpersonal harms.

rights protect economic interests as well as physical and emotional interests. *See Prosser & Keeton on Torts* 2-3 (5th ed. West 1984); American Bar Ass'n, *Toward a Jurisprudence of Injury* 3-1 - 3-5 (1984). In recognition of this basic fact of tort law, the Internal Revenue Service itself has rejected the argument that the portions of personal injury recoveries attributable to wages are taxable. Rev. Rul. 85-97, 1985-2 C.B. 50.

The assertion of Petitioner United States that the injury in the underlying Title VII case was to economic interests simply begs the question whether invidious employment discrimination is a personal injury. According to controlling precedents of this Court, the mere fact that economic interests are injured as a result of discrimination does not convert the injury from personal to nonpersonal. Nor does it convert the claim from one sounding in the nature of tort to one based on contract. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1986), fully determined these principles, and there is no need to reconsider them in the present case.

Goodman, a Title VII and 42 U.S.C. § 1981 case brought against the Union and employer for race discrimination in employment, held that the injury suffered was personal, and thus the statute of limitations governing personal injury claims, rather than contract claims, controlled. The petitioners in that case sought to distinguish *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985), which held that § 1983 injuries were personal and tort-like in nature and thus governed by the personal injury limitations period, by arguing that § 1981 dealt with economic rights only. This argument, rejected by the Court, is virtually identical to the position now taken by the United States. The Court held in *Goodman* that "racial discrimination is a fundamental injury to the individual rights of a person." 482 U.S. at 661, 107 S. Ct. at 2621. The fact that a contract was at issue in no way altered this conclusion:

> Insofar as [§ 1981] deals with contracts, it declares the personal right to make and enforce contracts—a right that may not be interfered with on racial grounds. That § 1981 has far-reaching economic consequences does not change this conclusion [that fundamental personal rights are involved], since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. at 661-62.

This reasoning can be applied verbatim to Title VII. Just as racial discrimination is a fundamental injury to the individual rights of a person, so is sex-based discrimination made actionable by Title VII. Thus, the Sixth Circuit was correct to follow this Court's controlling precedents of *Goodman* and *Wilson* to hold that "injuries resulting from invidious discrimination, be it on the basis of race, sex, national origin or some other unlawful category, are injuries to the individual rights and dignity of the person." 929 F.2d at 1121 (Pet. app. at 6a). As the Tax Court noted in *Metzger*, *supra*, the injuries actionable under Title VII are as much personal injuries as those actionable under its fellow parts of the Civil Rights chapter of the U.S. Code, including §§ 1981 and 1983. 88 T.C. 834, 856 (1987).

The fact that the decision below was dictated by controlling precedents of this Court provides ample reason to deny the writ.

CONCLUSION

The Petition sets forth no basis for review by this Court, since there is not in fact a square conflict between the circuits, and the Sixth Circuit resolved the determinative issue consistently with decisions of this Court and other courts. The Petition should therefore be denied.

Respectfully submitted,

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